

FILED

OCT 26 2004

United States District Court for the
District of Columbia

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

OMB Watch)
1742 Connecticut Avenue, N.W.)
Washington, DC 20009)
and)
ELECTRONIC PRIVACY INFORMATION CENTER)
1718 Connecticut Avenue, N.W., Suite 200)
Washington, DC 20009,)
Plaintiffs,)

v.

DEPARTMENT OF HOMELAND SECURITY
Washington, DC 20528,
Defendant.

CASE NUMBER 1:04CV01869

JUDGE: James Robertson

DECK TYPE: FOIA/Privacy Act

DATE STAMP: 10/26/2004

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for injunctive and other appropriate relief, seeking the release of agency records detailing the Department of Homeland Security's ("DHS") compliance with its statutory duty to implement the Critical Infrastructure Information Act ("CIIA"), 6 U.S.C. § 133.

Jurisdiction and Venue

2. This court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B).

Parties

3. Plaintiff OMB Watch is a non-profit research and advocacy organization incorporated in Washington, DC. OMB Watch is dedicated to promoting government accountability and citizen participation in public policy decisions. This mission centers on four main areas: the federal budget, regulatory policy, public access to government information, and public participation by non-profit organizations. OMB Watch maintains a website (www.ombwatch.org) containing extensive information on these issues, including information OMB Watch has obtained from federal agencies under the FOIA.

4. Plaintiff Electronic Privacy Information Center ("EPIC") is a public interest research organization incorporated as a not-for-profit corporation in Washington, DC. EPIC's activities include the review of federal law enforcement activities and policies to determine their possible impacts on civil liberties and privacy interests. Among its other activities, EPIC publishes books, reports, and a bi-weekly electronic newsletter. EPIC also maintains a heavily-visited website (www.epic.org) containing extensive information on privacy issues, including information EPIC has obtained from federal agencies under the FOIA.

5. Defendant DHS is a Department of the Executive Branch of the United States government. DHS is an agency within the meaning of 5 U.S.C. § 552(f). DHS was created by the Homeland

Security Act of 2002. 6 U.S.C. § 111. Among its other duties, DHS must implement the CIIA. 6 U.S.C. § 133(e).

The Critical Infrastructure Information Act

6. The CIIA requires DHS to collect and protect voluntarily submitted information which is "not customarily in the public domain and related to the security of critical infrastructure or protected systems." 6 U.S.C. § 131(3). This information is protected by the CIIA from disclosure requirements, including the FOIA. 6 U.S.C. § 133(a)(1).

7. The CIIA also required DHS to "establish uniform procedures for the receipt, care, and storage" of voluntarily submitted Critical Infrastructure Information ("CII") no later than 90 days after November 25, 2002. 6 U.S.C. § 133(e)(1). To comply with its statutory duty, DHS should have developed those procedures by early 2003, but it did not publish its interim rule until February 20, 2004. 69 Fed. Reg. 8,073 (Feb. 20, 2004) (codified at 6 C.F.R. pt. 29).

8. Information customarily in the public domain cannot be protected from disclosure by the CIIA. See 6 U.S.C. § 131(3). Thus, information about DHS's methods for implementing the CIIA and tracking submissions, as well as aggregate data regarding submissions are not protected from disclosure by the CIIA.

Plaintiffs' Request and Defendant's Response

9. By letter dated April 16, 2004, Plaintiffs sent a request under the FOIA to Elizabeth Withnell, Departmental Disclosure Officer of DHS. The request was sent via certified mail and signed for by Elizabeth Withnell on April 22, 2004. A copy of that letter and the certified mail receipt are attached to this Complaint as Exhibit 1.

10. Plaintiffs' April 16, 2004 request conformed to Defendant's FOIA requirements.

11. Plaintiffs requested records relating to the implementation of the CIIA, including the following:

i. records in the custody of DHS that index CII, including CII submitted to DHS by other Federal Agencies, United States government contractors, Foreign, State, and local governments, and government authorities, including, but not limited to:

- a) date of receipt,
- b) name of submitter,
- c) description of information,
- d) manner of acknowledgment,
- e) tracking number, and
- f) validation status;

ii. written communications submitted by a "person or entity," as defined by the CIIA, requesting that accompanying information be deemed Protected CII, including, but not limited to:

- a) express statements, as identified in 6 C.F.R. § 29.5(a)(3), and

- b) certification statements, as identified in 6 C.F.R. § 29.5(a)(4);
- iii. written communications to a person or entity acknowledging the receipt of a request that information be deemed Protected CII;
- iv. written communications from a person or entity regarding the status of a person's or entity's request that information be deemed Protected CII;
- v. written communications to a person or entity regarding the status of a person's or entity's request that information be deemed Protected CII;
- vi. copies of information submitted by a person or entity where the information was deemed non-CII or non-Protected CII;
- vii. written communications explaining any interim procedures in effect prior to the promulgation of the interim rule for the receipt, care, and storage of CII by all Federal agencies, United States government contractors, Foreign, State, and local governments, and government authorities;
- viii. written communications submitted to DHS by other Federal agencies, United States government contractors, Foreign, State, and local governments, and government authorities concerning the application or scope of the CIIA to their actions;
- ix. written communications submitted by DHS to Federal agencies, United States government

contractors, Foreign, State, and local governments, and government authorities concerning the application or scope of the CIIA to their actions;

x. written communications responding to an inquiry from a person or entity that explain the interim procedures in effect prior to the promulgation of the interim rule for a person or entity to submit CII to DHS; and

xi. written materials regarding the operation of the software program that will be used to track requests that information be deemed CII and protected accordingly, including, but not limited to:

- a) the data dictionary used to construct the software program, and
- b) software manuals.

12. By letter dated June 8, 2004, Defendant, by its agent, J.A. Kendrick, Director of Departmental Disclosure of DHS, acknowledged receipt of Plaintiffs' April 16, 2004 request. In that letter, Defendant stated that it was "referring [the] request to the FOIA Officer for the Information Analysis and Infrastructure Protection (IAIP), Sue Armstrong at fax number 202-282-8802 for processing and direct response to [Plaintiffs]."

13. Defendant's June 8, 2004 letter was postmarked on June 10, 2004 and sent via regular mail. Plaintiffs received the letter on June 16, 2004.

14. On September 17, 2004, Plaintiffs telephoned Sandy Ford, Disclosure Officer for the IAIP Directorate of DHS, to

determine the status of the April 16, 2004 request. Ms. Ford informed Plaintiffs that Defendant had no record of the request. At Ms. Ford's suggestion, on September 17, 2004, Plaintiffs sent a facsimile to her attention with a copy of the request and a copy of the delivery confirmation card.

15. By letter dated September 20, 2004, Ms. Ford acknowledged receipt of the facsimile. By providing Plaintiffs with a new reference number in that letter, Ms. Ford implied that Defendant considered the request new. The letter noted that Defendant "processes FOIA requests according to their order of receipt."

16. To date, Defendant has not provided the requested records to Plaintiffs.

CAUSE OF ACTION

Defendant Has Violated the FOIA by

Failing to Timely Respond to Plaintiffs' Request

17. By letter dated April 16, 2004, Plaintiffs requested records from Defendant under the FOIA. Defendant received Plaintiffs' April 16, 2004 request on April 22, 2004. Thus, Defendant should have responded no later than May 20, 2004.

18. In a letter dated June 8, 2004, Defendant acknowledged receipt of Plaintiffs' April 16, 2004 request and stated that it would process the request.

19. To date, Defendant has not provided the requested records to Plaintiffs, notwithstanding the FOIA's requirement that an agency respond to a request within twenty (20) business days.

20. Plaintiffs have exhausted the applicable administrative remedies.

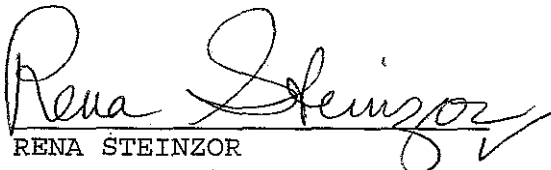
21. Defendant has improperly withheld the requested records from Plaintiffs.

Demand for Relief

WHEREFORE, Plaintiffs pray that this Court:

- A. order Defendant to disclose the requested records in their entirety and make copies available to Plaintiffs;
- B. provide for expeditious proceedings in this action;
- C. award Plaintiffs their costs and reasonable attorneys fees incurred in this action; and
- D. grant such other relief as the Court may deem just and proper.

Respectfully Submitted on October 21, 2004,



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Counsel for Plaintiffs

CLINICAL LAW OFFICE



UNIVERSITY OF MARYLAND
SCHOOL OF LAW

April 16, 2004

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Elizabeth R. Withnell
Departmental Disclosure Officer
Department of Homeland Security
Washington, DC 20528

Re: Freedom of Information Act Request for Critical Infrastructure Information Records

Dear Ms. Withnell:

This letter is a request for agency records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. On behalf of our clients, OMB Watch and the Electronic Privacy Information Center (EPIC), we request the following records concerning Critical Infrastructure Information (CII), as defined by the Critical Infrastructure Information Act of 2002 (CII Act), 6 U.S.C. §§ 131-134:

1. records in the custody of the Department of Homeland Security (DHS) that index CII, including CII submitted to the DHS by other Federal agencies, United States government contractors, Foreign, State, and local governments, and government authorities, including, but not limited to:

- a) date of receipt,
- b) name of submitter,
- c) description of information,
- d) manner of acknowledgment,
- e) tracking number, and
- f) validation status;

2. written communications submitted by a "person or entity," as defined by the CII Act, requesting that accompanying information be deemed Protected CII, including, but not limited to,

- a) express statements, as identified in 6 C.F.R. § 29.5(a)(3), and
- b) certification statements, as identified in 6 C.F.R. § 29.5(a)(4);

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3. written communications to a person or entity acknowledging the receipt of a request that information be deemed Protected CII;
4. written communications from a person or entity regarding the status of a person's or entity's request that information be deemed Protected CII;
5. written communications to a person or entity regarding the status of a person's or entity's request that information be deemed Protected CII;
6. copies of information submitted by a person or entity where the information was deemed non-CII or non-Protected CII respectively;
7. written communications explaining any interim procedures in effect prior to the promulgation of the interim rule for the receipt, care, and storage of CII by all Federal agencies, United States government contractors, Foreign, State, and local governments, and government authorities;
8. written communications submitted to the DHS by other Federal agencies, United States government contractors, Foreign, State, and local governments, and government authorities concerning the application or scope of the CII Act to their actions;
9. written communications submitted by the DHS to Federal agencies, United States government contractors, Foreign, State, and local governments, and government authorities concerning the application or scope of the CII Act to their actions;
10. written communications responding to an inquiry from a person or entity that explain the interim procedures in effect prior to the promulgation of the interim rule for a person or entity to submit CII to the DHS; and
11. written materials regarding the operation of the software program that will be used to track requests that information be deemed CII and protected accordingly, including, but not limited to,
 - a) the data dictionary used to construct the software program, and
 - b) software manuals.

If any part of this request is denied, please describe the nature of the records withheld and the reason for denying the release of such records. When responding, please reference the applicable FOIA exemption and the specific numbered request from above.

In addition, as required by the FOIA, please release all segregable parts of the records that remain after the exempted material has been deleted from the records we are

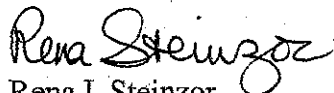
seeking. To expedite this request, we would be willing to discuss specific instances of deletions or other exemption claims in advance of the final decision of the agency.

For purposes of fee assessment, we ask that this request be treated as one submitted by a "representative of the news media" under the FOIA and 6 C.F.R. § 5.11. OMB Watch and EPIC are public interest organizations that regularly publish and disseminate information relating to emerging policy issues. Indeed, the U.S. District Court for the District of Columbia has expressly held that EPIC is entitled to "news media" fee status. *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003). We further request a waiver of duplication fees for this request, as disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not for a commercial purpose.

In the event you deny the request for a fee waiver, we agree to pay reasonable duplication fees for the processing of this request. If the fees will exceed \$150, please notify Rena Steinzor at (410) 706-0564 or rstein@law.umaryland.edu prior to incurring any expenses in excess of that amount.


We look forward to your reply within 20 business days, as required by the FOIA. Thank you for your assistance.

Sincerely,



Rena I. Steinzor,
Director
Becky Lukaesko,
Student Attorney*
University of Maryland
Environmental Law Clinic

Attorneys for OMB Watch



David L. Sobel,
General Counsel
Electronic Privacy
Information Center

* Practicing pursuant to Federal Rule 502.

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<p>■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</p> <p>■ Print your name and address on the reverse so that we can return the card to you.</p> <p>■ Attach this card to the back of the mailpiece, or on the front if space permits.</p>		<p>A. Signature x <i>E. Withnell</i> <input type="checkbox"/> Agent <input checked="" type="checkbox"/> Addressee</p>	
<p>1. Article Addressed to:</p> <p>Elizabeth R. Withnell Departmental Disclosure Officer Dept. of Homeland Security Washington D.C. 20528</p>		<p>B. Received by (Printed Name) E. WITHNELL</p> <p>C. Date of Delivery 4/22/04</p>	
		<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input checked="" type="checkbox"/> No</p>	
		<p>3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input checked="" type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D. </p>	
		<p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>	
<p>2. Article Number (Transfer from service label) 7 7001 0320 0004 5540 0386</p>			
<p>PS Form 3811, August 2001 Domestic Return Receipt 102395-01MH1540</p>			

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